



Signed and Filed: November 05, 2010

Lewis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

9 In re) Bankruptcy Case
10 HIGINO SISON GOMEZ, III, and URDUJA) No. 10-31184
11 GABON GOMEZ,) Chapter 13
12)
13 Debtors.)
14)
15 HIGINO S. GOMEZ, III, and URDUJA) Adversary Proce
16 GABON GOMEZ,) No. 10-3077DM
17)
18 Plaintiffs,)
19)
20 v.)
21)
22)
23 GMAC MORTGAGE, LLC, fka GMAC)
24 MORTGAGE CORPORATION; GILBERT M.)
25 WALZ,)
26)
27 Defendants.)
28)

MEMORANDUM DECISION ON STANDING
TO MAKE CREDIT BID

Defendant, GMAC Mortgage, LLC ("GMAC") has presented no evidence in its supplemental brief that it was the beneficiary of record entitled to tender a credit bid at the non-judicial sale of plaintiffs' property. Instead, it offers a "so what?" argument to the effect that plaintiffs suffered no damages because a credit bid would have been made in any event, and unless a cash bidder offered an amount in excess of GMAC's loan, there would be no surplus.

1 Plaintiffs correctly argue that California law is clear,
2 viz., Civil Code § 2932.5 empowers the mortgagee or person
3 entitled to be paid to exercise the power of sale. Thus, without
4 demonstrating that it was that "person entitled" as of the sale
5 date, GMAC could not cause the sale. Further, Civil Code §
6 2924h(b) restricts the right to make a credit bid to the "present
7 beneficiary." See also Miller & Starr, 4 Cal Real Est. § 10.204
8 (3d ed.). The record does not support a basis to conclude that
9 GMAC was able to make a credit bid, so its motion to dismiss the
10 remaining claims for relief must be denied.

11 Whether plaintiffs may ultimately prove damages is not
12 relevant in disposing of GMAC's FRBP 7012(b)(6) motion to dismiss
13 the second amended complaint.

14 At the hearing on October 1, 2010, the court announced its
15 ruling as to GMAC's alleged violation of the automatic stay. That
16 disposes of plaintiff's First Claim for Relief insofar as GMAC is
17 concerned; it does not deal with the allegations as to Gilbert M.
18 Walz. This memorandum decision deals with the remaining issues in
19 GMAC's motion. Counsel for plaintiffs should prepare, serve and
20 upload an order granting GMAC's motion as to the First Claim for
21 Relief and denying it as to the Second, Third, Fourth and Fifth
22 Claims for Relief.

23 Mr. Walz's motion to dismiss was dropped from calendar
24 pending the court's ruling. It will be restored to calendar,
25 along with a status conference, on December 10, 2010. Plaintiffs'
26 opposition to that motion is due fourteen days prior, and
27 defendant Walz's reply is due seven days prior.

28 || **END OF MEMORANDUM DECISION**